NO. 91-1657

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Charlene **LEATHERMAN**, et al.,
Petitioners

V.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, et al.,
Respondents

On Writ Of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

PETITIONERS' REPLY BRIEF

DON GLADDEN
P. O. Box 50686
Fort Worth, TX 76105
817-531-3667
Counsel of Record

RICHARD GLADDEN
420 S. Carroll, Suite E
Denton, TX 76201
817-387-7833

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I.

RESPONDENTS RAISE QUESTIONS NOT PRESENTED FOR REVIEW BUT WHICH WOULD, IN ANY EVENT, REQUIRE REVERSAL OF THE JUDGMENT BELOW

Most of the respondents' briefs concern two questions which are not at issue. First, would it be desirable to have a Rule of Civil Procedure that requires heightened pleading in Section 1983 cases against municipalities? Petitioners believe that the answer is no, but even if the answer were yes, there is procedure for making changes in the Rules that is prescribed in 28 U.S.C Sec.2072 and that has not been followed here.

Second, respondents discuss at length what Petitioners will have to prove in order to prevail at trial, but that, too, is irrelevant to the questions presented. Petitioners agree, and they have pled accordingly, that they must show more than that unconstitutional acts were committed by officers or employees of the respondent municipalities. They acknowledge that they must show that the harm resulting to them was caused by a policy or practice of the respondents. Assuming, without deciding, that the two incidents alleged in the complaint could not satisfy this requirement, that fact is

irrelevant at this time since the case is simply at the pleadings stage. As this Court has recently underscored in two decisions dealing with the issue of standing, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992), and Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990), there is a substantial difference between a complaint that will satisfy the Rules, and the facts that need to be shown to avoid summary judgment or to have it granted in plaintiff's favor.

II.

HAVING VIRTUALLY CONCEDED THAT THE HEIGHTENED PLEADING REQUIREMENT AS APPLIED IS NOT AUTHORIZED BY RULE 9(b), RESPONDENTS CANNOT LOGICALLY ARGUE THAT A HEIGHTENED PLEADING REQUIREMENT IS IMPOSED, OR PERMITTED, BY RULE 8.

The question actually presented is whether the Court of Appeals erred in requiring heightened pleadings for civil rights complaints against municipalities. Petitioners' argument in their

opening brief was quite simple: nothing in Rule 8 requires heightened pleading; the drafters of the Rules specified the circumstances under which heightened pleading was required in Rule 9(b); all parties agree that this case does not fall within Rule 9(b); and hence there is no requirement that the complaint be pled with any more specificity than ordinary federal court cases.

What is most surprising about the more than 100 pages of briefs filed by respondents, and the 64 pages filed by their amici is that the only discussion of Rule 9(b) is in a single paragraph on page 19 of the brief of the respondent Grapevine. After observing that securities fraud plaintiffs are sometimes required to plead detailed facts, the brief suggests that, "[t]o some extent this approach can be explained by the special pleading requirements of Rule 9(b) Fed. R. Civ. P. which requires that in fraud cases 'circumstances constituting fraud . . . shall be stated with particularity.'" That is the sum and substance of the discussion of Rule 9(b) in any

of the opposing briefs. There is not even an attempted explanation of why the drafters of the Rules imposed a specific pleading requirement in Rule 9(b) for fraud and certain other cases, but intended the same requirement sub silentio in Rule 8 to an undescribed class of civil rights complaints against municipal defendants and perhaps others.

But the lesson of Rule 9(b) is clear; when the Court wishes to impose heightened pleadings, it does so in clear and unmistakable language as it did in Rule 9(b). Otherwise, all complaints are subject to the general notice pleading requirements under Rule 8(b) which means only, as this Court observed in Conley v. Gibson, 355 U.S. 41, 47 (1957), that the defendants receive "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Petitioners satisfied that burden here, and hence it was error to dismiss their complaint.

III.

IN THE ABSENCE OF AN AVAILABLE ABSOLUTE OR QUALIFIED IMMUNITY, AS DETERMINED BY REFERENCE TO FEDERAL LAW, AND NOT STATE COMMON LAW IMMUNITIES, RESPONDENTS CANNOT RELY ON AN IMMUNITY FROM SUIT TO JUSTIFY THE HEIGHTENED PLEADING REQUIREMENT.

Respondents recognize that under Owen v. City of Independence, 445 U.S. 621 (1980), they have no immunity -- absolute or qualified -- but nonetheless seek to rely on judge-created special pleading rules in qualified immunity cases. This argument is misplaced for at least two reasons.

First, Petitioners are suing under Section 1983, and the common law immunity for municipalities is irrelevant, as established by Owen, 445 U.S. at 647-48. Respondents cannot bring in by the back door a requirement premised on an immunity which this Court has barred by the front door of Owen. Second, the respondents confuse what Petitioners must prove in order to prevail at trial (or to defeat

summary judgment), with what they must plead to avoid dismissal. Petitioners here specifically pled the necessary elements of their Section 1983 claim against the municipalities.

Respondent Grapevine argues in its brief at page 14 that, if the courts allow Petitioners to go forward without facts to prove their claim, "municipalities would be hauled into court in many instances when, under the substantive law of Sec. 1983, these cases would eventually be thrown out because the plaintiffs could not meet their burden of proof. This situation wastes both the taxpayer's money and scarce judicial resources." According to respondent, a heightened pleading standard ensures that "only truly meritorious Sec. 1983 claims go forward and that these meritorious claims are given the attention they rightfully deserve." Id.

Of course, Grapevine's conclusion that some cases would be eventually dismissed is correct, but the same is true of countless other cases filed in the federal courts under our system of notice pleading.

But the decision to allow such cases to proceed to discovery is plainly the judgment made by this Court and the drafters of the Rules, which have been in effect for more than 50 years. They concluded that it is preferable, as a matter of policy, to allow cases to be filed in federal courts without proof to support the claims, and even without very specific allegations, in order to assure that plaintiffs have an opportunity to prove their claim after discovery, except in those few cases where there is a Rule specially providing for heightened pleading, such as that set forth in Rule 9(b). While Grapevine wishes that only "truly meritorious Sec. 1983 claims" should be allowed to survive a motion under Rule 12(b)(6) -- without telling the Court who will decide which claims are meritorious and how -- its argument that heightened pleading is the way to eliminate unmeritorious claims is simply not justified by the Federal Rules of Civil Procedure or their underlying philosophy. And if there are claims that

should not have been brought into federal court, the proper remedy is through Rule 11, which provides for sanctions against attorneys who do not have reasonable basis in law and fact for complaints they file.

IV.

IN LIGHT OF THE PRAGMATIC AND THEORETICAL DIFFICULTIES WITH APPLICATION OF THE HEIGHTENED PLEADING REQUIREMENT, PROTECTING LITIGANTS FROM VEXATIOUS OR ABUSIVE LITIGATION IS BEST EFFECTED BY JUDICIAL USE OF AVAILABLE RULES TO CONTROL OR LIMIT DISCOVERY.

In their opening brief, Petitioners explained that the heightened pleading rule in cases against municipalities made it particularly difficult for plaintiffs to survive a motion to dismiss because the specific facts needed to prove their cases (such as this case, which involves inadequate training and/or improper supervision) are simply not available without formal discovery, unlike the wrongful acts of individuals for which there is ordinarily

substantial pre-filing evidence, direct and/or circumstantial. In their briefs, respondents suggest that additional information was available under Texas law and that, in any event, Petitioners had an opportunity to take discovery in this case, which they did not do, and so they are in no position to complain. Neither contention is sufficient to justify a heightened pleading requirement.[1]

As far as Texas law is concerned, Petitioners strongly disagree that the evidence they needed would be available before suit, both because of exemptions under the law, and because Petitioners would need to take depositions and the Texas open record law applies only to documents. But more fundamentally, the heightened pleading

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[1]The near impossibility of meeting this requirement without discovery can be seen by looking at the detailed nature of the proof that respondent Lake Worth in its brief says must be pled in cases like this (at 21-22) and asking how any plaintiff can even meet that burden without taking discovery.

requirement cannot depend on the vagaries of Texas law, because Rule 8 applies to all cases, and not just those filed in Texas. To make the applicability of heightened pleading depend on the availability of a state law permitting pre-suit discovery would undermine the goals and scope of Rule 1, which makes the Federal Rules applicable "to all suits" and provides that "they shall be construed to secure the just, speedy, and inexpensive determination of every action."

The fact that Petitioners might have, but did not take additional discovery here is also irrelevant. It is, of course, not part of the question on which review was granted, any more than is the respondents' other claim that, in any event, summary judgment against Petitioners was proper. Moreover, if the complaint was defective as filed, then respondents were entitled to immediately move to dismiss and deny Petitioners all opportunity to take discovery, just as they could if

the complaint were based on an allegation of fraud and Rule 9(b) had not been satisfied.

The fundamental problem raised by the lack of discovery, coupled with the heightened pleading requirement, was recognized and directly confronted in the briefs filed by two of respondents' amici, the State of Texas, joined by 13 other states, and the National Institute of Municipal Law officers, and its six co-amici. Both briefs recognize the force of the concurring opinion of Judge Goldberg below where he raised this problem, and both propose a solution which is precisely the one Petitioners embraced. In these types of cases, plaintiffs should be allowed limited discovery on the policy/pattern issue, and if they cannot meet their burdens, then summary judgment should be granted for the defendants. See Texas Br. at 14, n. 8, and National Institute Br. at 27, n. 18. Whether it is necessary to require a plaintiff who has obtained the requisite facts in discovery to replead his complaint, or whether there are other means better

suited to the task of specifically informing defendants of the facts on which the claim is based, is an issue of no great moment since, unlike the ruling of the Fifth Circuit, the plaintiff in such a case would be able to satisfy any reasonable requirement, once he had taken discovery on the issue. Stated another way, the answer to the legitimate interests of municipalities in avoiding unnecessary litigation is not to impose a heightened pleading requirement under Rule 8, but the judicious use of Rule 16 to control discovery, by isolating potentially dispositive issues for early discovery and possible summary judgment.

V.

THE QUESTION PRESENTED FOR REVIEW IS NEITHER MOOT NOR SUBJECT TO COLLATERAL ESTOPPEL

Finally, respondents Grapevine and Tarrant County urge the Court to affirm as to the Andert Petitioners because of an adverse ruling against them in a suit the Andert Petitioners brought

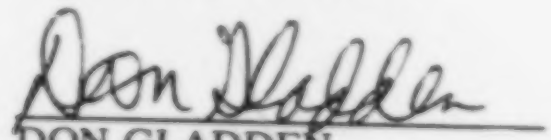
against the individual officers involved in their incident. Like the other claims of respondent, that, too, is misplaced. Although couched in several places in terms of mootness, which is an issue the Court can always reach, it is plain that Petitioners' claim for money damages is not moot because no one has paid them the money that they have demanded. The only arguable claim that respondents have is one of collateral estoppel, but even that is not properly before this Court, both because it is not part of the question presented, and because, in any event, the decision relied on is not final, but on appeal (No. 92 - 1467, 5th Cir., Notice of Appeal filed May 19, 1992). The pendency of that appeal was noted in Petitioners' Reply Brief in Support of Certiorari dated May 22, 1992, but omitted from respondents' briefs on the merits.

* * *

CONCLUSION

In short, the heightened pleading requirement is an invention of the Fifth Circuit and other courts which finds no basis in the Federal Rules. To the extent that it is needed to respond to a problem, it is a problem that is non-existent, is an inevitable result of notice pleading, and/or can be handled adequately by other provisions of the Federal Rules. Accordingly, the decision of the Court of Appeals should be reversed, and the case remanded to the trial court for further proceedings.

Respectfully submitted,



DON GLADDEN
P.O. Box 50686
Fort Worth, Texas 76105
817-531-3667
Counsel of Record
&
RICHARD GLADDEN
420 South Carroll, Suite E
Denton, Texas 76201
817-387-7833
ATTORNEYS FOR
PETITIONERS